No. [illegible] October Term, 1899.

No. 225.

IN THE

Supreme Court of the United States.

Dft. of Dale, Dickson & Bullitt &c

Leave.

Shirley T. Leigh *et al.* Executors, Appellants,

Filed Oct. 16, 1899.

F. E. Coyne, Collector, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, OF THE NORTHERN DISTRICT OF ILLINOIS.

PETITION

Of the Fidelity Insurance, Trust and Safe Deposit Company for leave to be heard by Counsel as a party interested,

AND

BRIEF OF ARGUMENT

On the Constitutionality of the Act of Congress of June 13th, 1898, imposing a tax on all personal estates of decedents.

RICHARD C. DALE,
SAMUEL DICKSON,
JOHN C. BULLITT,
Of Counsel for the Fidelity Insurance, Trust and Safe Deposit Company.

In the Supreme Court of the United States.

Shirley T. High, Executor, vs. *F. E. Coyne, Collector.*	October Sessions, 1899. No. 225.

To the Honorable the Judges of the Supreme Court:

The petition of the Fidelity Insurance, Trust and Safe Deposit Company respectfully shows:—

First.—That it is a corporation organized under the laws of the State of Pennsylvania, having its office in the city of Philadelphia, possessing under its charter the right to act as executor and administrator of the estates of decedents, and that it is interested in the determination of the question of the constitutionality of the provisions of the Internal Revenue Act of June 13th, 1898, which is involved in the appeal in the above-entitled case.

Second.—As executor under the will of Daniel Craig, your petitioner paid, under protest, to the Collector for the First Internal Revenue District of Pennsylvania, on May 9th, 1899, the sum of $168.75, and after a petition for the refunding of the same, as prescribed by the Revised Statutes, had been refused by the Commissioner of Internal Revenue, your petitioner brought suit against said collector for the recovery of the same, which action is now pending in the Circuit Court of the United States for the Eastern District of Pennsylvania, as of October Sessions, 1899, No. 2.

Third.—Your petitioner is also the executor and administrator of numerous other estates in the settlement of which

taxes will be payable if the constitutional validity of the provisions of said statute be sustained.

The magnitude of your petitioner's interest in the question is disclosed by the following schedule showing the estates of decedents dying since June 13th, 1898, of which your petitioner is executor and administrator, and the estimated amount of tax payable thereon, as nearly as the same can now be determined:

Name of Estate.	Approximate Tax
Mary W. Johnson	$2,300 00
Joseph Roberts	119 00
Matilda Dillard	315 00
Albert N. Heritage	187 00
James M. Hilsee	575 00
Redwood F. Warner	11,104 00
Catharine Ervien	125 00
David Fleming	10,900 00
Hannah B. Crosman	7,300 00
Douglass Ottinger	1,625 00
Elizabeth Auble	600 00
Joseph M. Bennett	42,000 00
Wm. Penn Cooper	175 00
F. Campbell Stewart	9,700 00
Walter H. Tilden	10,600 00
Emily M. Woolverton	2,100 00
Mary Dwyer	2,000 00
Sarah W. Lewis	3,000 00
Tacy W. Robbins	1,900 00
John N. Hutchinson	250,000 00
Jennie H. Leavitt	3,500 00
Philip Gruner	1,600 00
	$361,725 00

By reason of its interest therein your petitioner respectfully prays your Honorable Court to permit it to be heard by counsel upon the questions involved, and that counsel have leave to file the printed brief of argument, of which a copy accompanies this petition.

The Fidelity Insurance, Trust and Safe Deposit Company,

By

H. GORDON McCOUCH,

Secretary.

STATE OF PENNSYLVANIA, }
EASTERN DISTRICT, } *ss.*

Before me, the undersigned, a notary public, residing in the city of Philadelphia, personally appeared H. Gordon McCouch, who, being duly sworn according to law, did depose and say: I am the secretary of the Fidelity Insurance, Trust and Safe Deposit Company; the statements of fact contained in the foregoing petition are just and true, as I verily believe.

H. GORDON McCOUCH.

Sworn to and subscribed before me, this fifth day of October, 1899.

W. C. HARRIS,
Notary Public.

In the Supreme Court of the United States.

Shirley T. High
vs.
F. E. Coyne, Collector.

October Term, 1899.
No. 225.

Brief Presented on Behalf of the Fidelity Insurance, Trust and Safe Deposit Company, Executor in Sundry Estates, upon the Constitutionality of the Federal tax on the Personal Estate of Decedents by Act of Congress of June 13th, 1898.

ABSTRACT OF ARGUMENT.

(*a.*) Congress has no power to legislate with reference to the devolution of estates of decedents or to regulate or control the exercise of the testamentary power of citizens of the several States. Legislative control over these matters is vested solely in the States. Hence an Act of Congress directing payment into the Federal Treasury of a certain percentage of decedents' estates cannot be sustained as an exercise of the legislative power regulating the devolution of decedents' estates. If upheld, it must be sustained as a valid exercise of the Federal taxing power.

Pages 5 to 10.

(*b.*) The tax imposed by the Act of June 13th, 1898, is not an excise upon the right to receive a legacy or distributive share of the estate of a decedent measured by the amount received, but a tax upon the property of

decedents in the hands of the executor or administrator, measured by the aggregate amount of the estate after the payment of debts—the rate of taxation increasing by a graduated scale whereby estates are divided into six classes for purposes of taxation.

Pages 10 to 14.

(*c.*) A tax imposed upon property as such, not being an excise upon the receipt of a legacy or upon the right to take a distributive share in a decedent's estate, is a direct tax within the meaning of the Federal Constitution, and hence must be apportioned among the States in proportion to the census.

Pages 14 to 30.

(*d.*) If the tax imposed be regarded, not as a direct tax, but as an excise, then Congress has failed to follow the constitutional rule of uniformity by directing that the tax be levied in accordance with a graduated scale whereby the rate of taxation increases as estates pass from a lower to a higher class for assessment—the line of demarkation between the several classes being simply a variation in the aggregate net amount of the estate of the decedent.

Page 30.

(*e.*) The rule of uniformity in taxation prescribed by the Constitution is not satisfied by a mere geographical uniformity. A uniform rate of taxation upon the same subject matter wheresoever situate within the limits of the taxing power is necessarily involved.

Pages 30 to 40.

(*f.*) To justify classification for taxation there must be substantial differences between the subject matters which are placed in the several classes, and the difference must relate to the subject matter which is classified—therefore accidental or collateral circumstances cannot be made the basis of classification. While the courts will not review

the legislative discretion involved in classification so long as the power is exercised upon rational lines, the courts have not hesitated to declare void statutes, which, if upheld, would involve a fraud upon the power.

Pages 40 to 50.

(*g.*) A classification, the only basis of which is that the unit of taxation is found with certain other units of specified number in a common ownership, is without reason—nay, more, it violates the fundamental American principle that the law makes no distinction between rich and poor.

Pages 50 to 52.

(*h.*) Any sanction to such distinction, either by legislative act or judicial decree, is calculated, by placing the burdens of government upon wealth, in the end to deprive the people at large of their due share in the conduct of government. That the powers of government are exercised by those who bear its burdens is the uniform testimony of history, and any class relieved by law from responsibility for the support of the State soon loses those characteristics of free citizenship which qualify it for participation in the privilege of a free government.

Pages 52 to 53.

(*i.*) Review of State decisions.

Pages 53 to 64.

ARGUMENT.

An Act of Congress, entitled "An Act to provide ways and means to meet war expenditures and for other purposes," approved June 13th, 1898, in section 29, provides as follows:—

> "That any person or persons having in charge or trust as administrators, executors, or trustees, any legacy or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of $10,000 in actual value, passing after the passage of this

Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, * * * shall be and hereby are made subject to a duty or tax, to be paid to the United States," shown in the following table:—

Degree of Consanguinity.

Amount of Estate.	Lineal issue, lineal ancestor, brother or sister.	Descendant of brother or sister.	Brother or sister of father or mother, or descendant of brother or sister of father or mother.	Brother or sister of grandfather or grandmother, or descendant of brother or sister of grandfather or grandmother.	Any other degree of consanguinity or stranger in blood or a body politic or corporate.
$10,000 to $25,000	75 c. per $100	$1.50 per $100	$3.00 per $100	$4.00 per $100	$5.00 per $100
$25,000 to $100,000	$1.12½ per $100	$2.25 per $100	$4.50 per $100	$6.00 per $100	$7.50 per $100
$100,000 to $500,000	$1.50 per $100	$3.00 per $100	$6.00 per $100	$8.00 per $100	$10.00 per $100
$500,000 to $1,000,000	$1.87½ per $100	$3.75 per $100	$7.50 per $100	$10.00 per $100	$12.50 per $100
Over $1,000,000	$2.25 per $100	$4.50 per $100	$9.00 per $100	$12.00 per $100	$15.00 per $100

Provided, that all legacies or property passing by will, or by the laws of any State or Territory, to *husband* or *wife* of the person died possessed as aforesaid, shall be *exempt* from tax or duty.

In the thirtieth section it is further provided:—

"That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share."

In the same section it is further provided that the receipts delivered by the collector for such payment—

> "shall be sufficient evidence to entitle such executors, administrators, or trustees to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators."

FIRST.

Before discussing the proper interpretation of this statute, or of the constitutional validity of its provisions, it is important to define with certainty the source of the power of Congress to legislate upon the subject. Statutory enactments such as are embodied in this Act of Congress are not entirely new in State legislation, and have been sustained some times as an exercise of the taxing power vested in the State Legislature and some times as an exercise of the legislative power of the State over the distribution of the estates of decedents, either as a regulation of the power of an owner of property to dispose of it by will or as a modification of the intestate laws of a State. It is important to notice that if these provisions of the Act of Congress are to be sustained, it must be as a valid exercise of the power of levying taxes, vested in Congress by the Federal Constitution. Congress has no power to legislate with reference to the devolution of estates. No Act of Congress can limit or vary the testamentary powers of citizens of the respective States. No Act of Congress can modify the intestate laws of any State. No Act of Congress can designate the Federal Treasury as one of the distributees of a dead man's estate. All moneys collected from the estates of decedents which are to find their way into the Federal Treasury must come through a valid exercise of the taxing power vested in Congress. It is important to recall this difference between the legislative power of Congress and the legislative power of the several State legislatures. The distinction is clearly made in the opinion of Mr. Justice McKenna in Magoun *vs.* Illinois Trust and Savings Bank, 170 U. S.,

283. After reviewing the legislation of the various States upon the subject of Inheritance Taxation, he said:—

> "It is not necessary to review these cases or to state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right or privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers and grant exemption and are not precluded from this power by the provisions of the respective State Constitutions requiring uniformity and equality of taxation."

In the case cited, the power of the Federal Supreme Court was invoked to set aside, as in conflict with the Federal Constitution, a statute which the Supreme Court of Illinois had decided was not in conflict with the Constitution of that State. On page 297 is a quotation from the opinion of the Supreme Court of Illinois, sustaining the statute as a valid exercise of the State's power to regulate the descent and devolution of a decedent's property:—

> "By this Act of the legislature six classes of property are created heretofore absolutely unknown. It is those classes of property depending upon the estate owned by one dying possessed thereof which the State may regulate as to its descent and the right to devise. * * * No person inherits property or can take by devise except by the statute; and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown."

This power of a State to regulate in the broadest manner succession to a decedent's property, as distinguished from the Federal power, had been recognized by the Supreme Court from the earliest times.

In Mager *vs.* Grima, 8 Howard, 490:—

> "By a law of the State of Louisiana, every person not having a domicile in that State, and not being a citizen of any State or Territory in the Union, who shall be entitled, whether as

heir, legatee, or donee, to the whole or any part of the succession of a person deceased, shall pay a tax to the State of ten per cent. of the value of the succession."

Mr. Chief Justice Taney said:—

"Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property, real or personal, within its dominion, may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or as legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interest or policy."

The same principle was recognized in United States *vs.* Fox, 94 U. S., 315, where Mr. Justice Field, in affirming a decree entered in the Court of Appeals of the State of New York, that the United States were not competent to take lands in that State as devisee, said:—

"The sole question for our consideration in this case is the validity of a devise to the United States of real estate situated in the State of New York. The question is to be determined by the laws of that State. It is not pretended that the United States may not acquire and hold real property in the State, whenever such property is needed for the use of the Government in the execution of any of its powers; as, for instance, when needed for arsenals, fortifications, lighthouses, custom houses, court houses, barracks, hospitals, or for any other of the many public purposes for which such property is used. And when the property cannot be acquired by voluntary arrangement with its owners, it may be taken against their will by the United States in the exercise of their power of eminent domain, upon making just compensation—a power which can be exercised in their own courts, and would always be resorted to, if, through caprice of individuals or the hostility of the State legislature, or other causes, harassing conditions were attached to the acquisition of the required property in any other way. Kohl *vs.* United States, 91 U. S., 367. The power of the State

to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick *vs.* Sullivant, 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

And so in United States *vs.* Perkins, 163 U. S., 635, it was held that personal property in New York bequeathed by will to the United States is subject to an inheritance tax under the State law. Mr. Justice Brown sustained the power of the State thus to regulate the transmission or devolution of a decedent's property, saying:—

"While the laws of all civilized States recognize in every citizen the absolute right to his own earnings and to the enjoyment of his own property and the increase thereof during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute, and within legislative control. 'By the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal; or if he died without a wife, he might then dispose of one moiety and the other went to his children; and so, *e converso*, if he had no children the wife was entitled to one moiety and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal.' 2 Bl. Com., 492. Prior to the Statute of Wills, enacted in the reign of Henry VIII., the right to a testamentary disposition of property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never

existed in this country, except in Louisiana, the right of a widow to her dower and to a share in the personal estate is ordinarily secured to her by statute.

"By the Code of Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one-half of the estate if the testator leave but one child; one-third, if he leaves two children; one-fourth, if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one-half of his property, and but three-fourths if he have ancestors in but one line. By the law of Italy, one-half of testator's property must be distributed equally among all his children; the other half he must leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the State of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.

"In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, the right to dispose of his property shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."

The same principle is expressed in the opinion of the Court of Appeals of New York in the matter of the estate of Swift, 137 N. Y., page 77:—

"The idea of this succession tax, as we may conveniently term it, is more or less compound; the principal idea being the

> subjection of property, ownership of which has ceased by reason of the death of its owner, to a diminution, by the State reserving to itself a portion of its amount, if in money, or of its appraised value if in other forms of property. The accompanying or the correlative idea should necessarily be that the property, over which such dominion is thus exercised, shall be within the territorial limits of the State at its owner's death, and therefore subject to the operation and the regulation of its laws. The State, in exercising its power to subject realty or tangible property to the operation of a tax, must, by every rule, be limited to property within its territorial confines."

So in the opinion of Mr. Chief Justice Fuller in Pollock *vs.* The Trust Company, 157 U. S., at 578, in referring to the grounds upon which the previous decision of this court in Scholey *vs.* Rew, 23 Wallace, 331, could be supported, it was remarked of the tax levied under the Internal Revenue law of 1864:—

> "It was like a succession tax of a State, held constitutional in Mager *vs.* Grime, 8 How., 490; and *the distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court.*"

It would seem unnecessary to further enlarge upon the proposition. It may be assumed as indisputable that if the provisions of the Act of 13 June, 1898, are upheld, they must be sustained as an exercise of the taxing power conferred upon Congress by the Federal Constitution.

If we have established our position that the source of the power of Congress to enact this statute must be traced to the taxing power, we will now proceed to a discussion of the proper interpretation of the statute and its constitutional validity.

SECOND.

The provisions of this statute differ very materially from the Succession Tax clauses of the Internal Revenue Act of June 30th, 1864, as amended by the Act of July 13th, 1866, which were the subject of construction by the Su-

preme Court in Scholey *vs.* Rew, 23 Wallace, 337, and which were as follows:—

> "That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this Act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession.' * * *
>
> "There shall be levied and paid to the United States in respect of every such succession as aforesaid, according to the value thereof, duties at rates depending upon the degree of consanguinity between predecessor and successor; and where the successor is a stranger in blood, at the rate of six per cent.
>
> "That the duty 'shall be paid at the time when the successor, or any person in his right or on his behalf shall become entitled in possession to his successor, or to the receipt of the income and profits thereof.'"

In Scholey *vs.* Rew the court held that the Succession Tax of 1864 was not a direct tax upon property, but an excise or duty upon the succession or devolution of title, and this construction was clearly warranted by the language of the Act of 1864, just quoted.

The language found in the twenty-ninth section of the Act of June 13th, 1898, is in striking contrast to that construed in Scholey *vs.* Rew. In the Act of 1898, the effective words are:—

> "That any person or persons having in charge or trust as administrators, executors, or trustees any legacies or distributive shares arising from any personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of $10,000, * * * shall be and hereby are made subject to a tax or duty, to be paid to the United States."

And by the thirtieth section the tax or duty thus imposed is made a lien or charge upon the property of the decedent until payment of the tax to the collector of the district of which the decedent was a resident.

It will also be noticed that the provisions of the Act of 1898, quoted above, materially differ from the sections

of the Internal Revenue Act of 1864, imposing a tax upon legacies and distributive shares of personal property.

13 Statutes at Large, pages 285-6-7, sections 124, 125.

While the draughtsman of the Act of 1898 to a considerable extent copied the phraseology of the Act of 1864, as to the tax on legacies, a striking contrast is found:—

First, in the exemption from tax being limited in the Act of 1864 to $1000, while in the Act of 1898 estates not exceeding $10,000 are exempt:

Second, in the graduated scale by which the rate of tax increases in proportion, not to the amount of the legacy received by the distributee, but in proportion to the aggregate amount of the personal estate passing from the decedent to all the legatees and distributees.

While it does not appear that the provisions of the Act of 1864, with reference to the tax on legacies and distributive shares, ever received judicial construction upon the question whether the tax there imposed was a tax on property, as distinguished from an excise on the right to take a legacy or distributive share, it may be admitted, for the purpose of this argument, that the court might have decided that under the Act of 1864 a uniform excise was imposed upon all persons of the same degree of consanguinity receiving legacies or distributive shares from the estates of decedents. No such construction can be given to the clauses of the Act of 1898 imposing a tax upon that portion of the personal estate of a decedent passing in legacies and distributive shares. The percentage of tax payable does not depend upon the amount of the legacy received or of the share passing in distribution. It is determined solely by the total net amount of the estate of the decedent remaining after payment of debts and expenses. Take the most simple illustration. Upon estates exceeding $10,000, and not exceeding $25,000, the rate of tax is seventy-five cents per $100 where the estate is distributable among the children of the decedent. If a testator leaves one child to whom an estate of $20,000

would descend, the tax chargeable against this distributive share of $20,000 would be $150. If, however, the testator left an estate of $60,000 to be divided between three children, each child receiving $20,000, the tax would be at the rate of one dollar and twelve and one-half cents per $100, or $250 for each $20,000. The degree of consanguinity is the same, the amount of the legacy is the same, but the child of a father leaving an estate of $60,000 would be charged fifty per cent. greater tax upon the same legacy than the child of a father leaving an estate of $20,000. This is the simplest illustration of the unequal operation of the tax, and shows that if it be treated as an excise tax on the right of a child to receive a legacy of $20,000 by a child, its operation is not uniform. An indefinite number of illustrations could be presented of its operation, which will readily occur to any one examining the schedule printed at page 4 of this brief.

These suggestions are presented at this stage of the argument, not for the purpose of invoking the constitutional rule of uniformity which is to be hereafter discussed, but for the purpose of showing that it cannot be assumed that the words of the statute are to be given a different construction from the plain and primary import of the words whereby the tax is imposed as a tax on property, and not as an excise duty on the right to receive a legacy or distributive share.

We are justified, therefore, at the outset in asserting that by the Act of 1898, Congress has imposed upon all personal property in the hands of executors or administrators, passing to legatees or distributees, a tax measured, not at a defined rate upon the total amount of each estate, nor even at a defined rate upon legacies of equal amount to persons of equal degree of consanguinity, but in accordance with a graduated scale whereby all estates are to be divided into six classes, and the rate upon the several classes increases in a graduated proportion, as shown in the foregoing table.

The validity of the Act is now questioned upon two grounds:—

First.—That this tax being a tax imposed upon property

and not upon the legacy or the right of succession, it is a direct tax, and therefore can only be levied in accordance with the rule of apportionment prescribed by article I., section 9, of the Constitution:—

> "No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

and article I., section 2:—

> "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers."

Second.—If this tax be not a direct tax within the meaning of the Constitution, but is to be treated as a duty or excise, then it fails to conform to the rule of uniformity prescribed by article I., section 8, of the Constitution, in which the taxing power is conferred:—

> "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States."

THIRD.

Is the Tax Imposed by the Act of 1898 a Direct Tax?

It would seem unnecessary to review all the matters elaborately discussed in the arguments of counsel and the opinions of the several judges filed in Pollock *vs.* Farmers' Loan and Trust Company 157 U. S., 429; 158 U. S., 601. The difficulties which surrounded the determination of the legal question involved in that case are not present here, unless the narrowest definition ever suggested for a direct tax be adopted, to wit, "that the term is limited to a capitation tax and land tax." The tax imposed by the Act of 1898 being a tax specifically upon property, and not upon the enjoyment or use of it, must be construed to be a direct

tax. That a direct tax should be limited by definition to a capitation or poll tax and taxes on lands and buildings, involves a much narrower construction of the Constitution than was suggested by Alexander Hamilton in his argument in Hylton *vs.* The United States, 3 Dallas, 171, quoted with approval in the opinion of Mr. Justice Swayne, in Springer *vs.* United States, 102 U. S., at page 598. The definition suggested by Hamilton is that direct taxes be held to be only—

> "Capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the whole property of individuals or on their whole real or personal estate. All else must of necessity be considered as indirect taxes."

The tax under consideration is a tax imposed, not on the right of legatees or distributees to receive a legacy, but on the entire personal estate of every decedent after deduction of the decedent's debts—a tax computed in the same way as an ordinary tax on the entire personal estate of a living owner, by an assessment of the surplus which remains after deducting sufficient to pay the owner's debts. By such deduction the assessment does not lose its quality as a general assessment on the whole personal estate of the party taxed.

This definition of Hamilton was quoted with approval in the opinion just referred to and is a far more rational definition than that which has found its way into some text books and legal writings, that direct taxes are limited strictly to capitation taxes and taxes on landed estates. Mr. Justice Swayne points out, as has been repeatedly noticed in other cases, that the real occasion of the apportionment clause was the determination of the Southern members of the Federal Constitutional Convention to deprive Congress of the power to impose a tax on slaves. Constitutional provisions in their operation are not to be limited to the particular circumstances which may have been the occasion of their adoption. Constitutional enactments are the expression of the fundamental principles which are to control the governmental powers of the

Union. But it is important to know the occasion of their adoption. Such knowledge throws light upon their real meaning. To protect the slave-holding States from discriminating taxation by a majority, citizens of other States, without interest in slaves, the apportionment clause was inserted, and it stands in the Constitution as a permanent bar to any exercise by Congress of the power of taxation which shall operate on property or its ownership directly as such, as distinguished from its enjoyment or consumption.

An attempt to express any authoritative rule limiting direct taxes to capitation taxes and land taxes is not warranted by the language of the distinguished judges whose casual expressions have been made the basis for the subsequent expressions. In Hylton's case the language of Mr. Justice Chase is:—

> "I am inclined to think, *but of this I do not give a judicial opinion*, that the direct taxes contemplated by the Constitution are only two, to wit, a capitation, or poll tax, simply without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property within the United States, is included within the term direct tax."

The question upon which Mr. Justice Chase did express a judicial opinion was this:—

> "That an annual tax on carriages for the conveyance of persons may be considered within the power granted to Congress to lay duties. * * *
>
> "It seems to me that a tax on expense is an indirect tax; and, I think, an annual tax on a carriage for the conveyance of persons is of that kind; *because a carriage is a consumable commodity, and such annual tax on it is on the expense of the owner.*"

The decision in Hylton's case we do not question. We rely on the point judicially decided as a foundation in our argument. To ask the court now to express a judicial opinion in the line of the definition given by Alexander Hamilton is not suggesting to the court new or novel doctrine, and if Hamilton's definition commends itself to the judgment of the court, it can be accepted, notwith-

standing that Mr. Justice Chase had doubts upon questions concerning which he declared he was not then called upon to give a judicial opinion.

Mr. Justice Patterson, delivering an opinion in the same case, shows that whatever doubt was in his mind was not on the side of the question expressed by Mr. Justice Chase. He says:—

> "Whether direct taxes, in the sense of the Constitution, comprehend any other than a capitation tax and tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States of the Union, then perhaps the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears, by the practice of some of the States, to have been considered as a direct tax. Whether it be so under the Constitution of the United States is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt the principal, *I will not say the only, objects* that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land."

Mr. Justice Iredell, in closing his opinion, said:—

> "There is no necessity or propriety in determining what is or is not a direct or indirect tax in all cases.
>
> "Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances.
>
> "A land or a poll tax may be considered of this description.
>
> "The latter is to be considered so particularly, under the present Constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five.
>
> "Either of these is capable of apportionment.
>
> "In regard to the articles, there may possibly be considerable doubt.
>
> "It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the Constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform."

As Hylton's case is the great authority upon which all subsequent reasoning as to the true construction of this clause of the Constitution has been based, we are justified in asserting that there is nothing to limit the phrase "direct" taxes to taxes upon land or poll taxes, either in the judgment rendered or in those portions of the opinions in which the judges undertake to make an authoritative statement of their judicial conclusions.

There was no further judicial construction of this clause until 1868; Mr. Hamilton's definition, therefore, may be accepted as a reasonable guide, unimpaired by anything to qualify or limit its application as broadly as he would have applied it.

The next case in which the clause was construed was the Pacific Insurance Company *vs.* Soule, 7 Wallace, 433. That case was heard on certificate of division from the Circuit Court for California. The question certified was whether a tax under the Internal Revenue Act of 1864, paid by the Pacific Insurance Company, a corporation engaged in the business of insurance, upon its dividends and income, was a direct tax within the meaning of the Constitution. The opinion of Mr. Justice Swayne upon the question is brief. After quoting the constitutional provisions, he briefly recites some of the extracts from Hylton's case, heretofore quoted, and after noticing that the doctrine of Hylton's case had the support of Chancellor Kent and Justice Story in their commentaries, he says:—

> "Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than 'taxes.' It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of 'imposts.'
>
> "Imposts is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Cowell says it is distinguished from custom, 'because custom is rather the profit which the price makes on goods shipped out.' Mr. Madison considered the term 'duties' and 'imposts' in these clauses as synonymous. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, "taxes and excises."'

"Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.

"The taxing power is given in the most comprehensive terms. The only limitations imposed are: That direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. With these exceptions, the exercise of the power is, in all respects, unfettered.

"If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which the tax upon the business of an insurance company can be held to belong to that class of revenue charges."

It will be perceived that the judgment of the court rested on the same ground as the judgment in the Hylton case, that the tax imposed was not a tax on property, as such, in a general sense. The tax upon carriages, in the language of Justice Chase, was a tax on "a consumable commodity and on the expense of the owner," so the tax on dividends and earnings was sustained as a tax upon the business which brought it, as an excise within the same class of revenue charges. There is nothing, therefore, in this case or in the opinion of Mr. Justice Swayne to qualify Mr. Hamilton's definition.

In the following year (1869), Veazie Bank *vs.* Fenno, 8 Wallace, 533, was decided. The tax there considered was that imposed under the Revenue Act of 1866 of ten per centum upon the circulating notes of State banks. One question determined was that this was not a tax which impaired the franchise derived by the several banks from the States granting their several charters. The other question determined was that it was not a direct tax. Although the case was argued for the banks by very distinguished counsel—Messrs. Reverdy Johnson and Caleb Cushing—it is difficult to see how even their great abilities could evolve an argument in support of their contention, and the report of their argument throws no light upon the grounds on which they undertook to support their

position. The whole report of the argument is as follows:—

> "That the tax in question was a direct tax, and that it had not been apportioned among the States agreeably to the Constitution.
>
> "In explanation of the nature of direct taxes they relied largely upon the writings of Adam Smith, and upon other treatises, English and American, of political economy."

While two of the justices dissented from the judgment of the court upon the ground that the tax was invalid as a taxation of the powers and faculties of the State government essential to State sovereignty, the judgment of the court appears to have been unanimous that the tax was an indirect, and not a direct, tax, subject to the constitutional duty of apportionment between the States. This judgment of the court does not involve any principle which is in conflict with the definition of a direct tax as stated by Mr. Hamilton. It is true that in the opinion of Mr. Chief Justice Chase, after a historical reference to the statutes under which direct taxation had been imposed in 1798, 1813, and 1816 on lands, improvements, dwelling houses, and slaves, and in 1861 on lands, improvements, and dwelling houses only, he states:—

> "This review shows that personal property, contracts, occupations and the like have never been regarded by Congress as proper subjects of direct tax."

This is undoubtedly a correct statement of an historical fact, but it does not tend to show, nor could the inference be drawn therefrom, that the failure of Congress theretofore to impose a direct tax on personal property broadly binds the Supreme Court to any particular determination upon the question whether a tax so imposed is or is not a direct tax. The question remained, as it had theretofore been, an undetermined question, upon which it would become the duty of the court to express an opinion when it was properly raised upon some record duly brought before them.

In Pollock *vs.* Farmers' Loan and Trust Company, 158

U. S., 629. Mr. Chief Justice Fuller points out the full effect which should be given to the argument based upon the absence of Congressional legislation:—

> "Nor are we impressed with the contention that, because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general Government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it."

We have already referred to Scholey *vs.* Rew, 23 Wallace, 331, pointing out that the tax there under consideration was distinctly not a tax on property, but a tax on the right of succession, and as such distinguishable from the present case. After referring to the provisions of the statute, Mr. Justice Clifford said:—

> "Such a tax or duty is neither a tax on land nor a capitation exaction, as subsequently appears from the language of the section imposing the tax or duty, as well as from the preceding section, which provides that the term succession shall denote the devolution of real estate; and the section which imposes the tax or duty also contains a corresponding clause which provides that the term successor shall denote the person so entitled, and that the term predecessor shall denote the grantor, testator, ancestor, or other person from whom the interest of the successors has been or shall be derived.
>
> "Successor is employed in the Act as the correlative to predecessor, and the succession or devolution of the real estate is the subject matter of the tax or duty, or, in other words, it is the right to become the successor of real estate upon the death of the predecessor, whether the devolution or disposition of the same is effected by will, deed, or laws of descent, from a grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived."

This construction of the statute under consideration indicates that the ground of the decision was, the tax was an excise upon a devolution of title; that the court did not then undertake to establish any rule which would

limit Mr. Hamilton's definition is found from the succeeding paragraphs in the opinion:—

> "Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax, such as the one involved in the present controversy."

Scholey *vs.* Rew is a case which, upon a casual reading, might appear to be an authority in favor of the validity of the present tax. It is proper, therefore, to reiterate the distinctions already referred to.

(*a.*) Scholey *vs.* Rew arose under the clauses of the Act of 1864, imposing a tax on the devolution of the title to real estate. The language of the clause, already quoted at length on page 11 of this brief, is clear. The tax is not upon property, but upon the "succession" to real estate.

> "There shall be levied and paid to the United States in respect to every such *succession* as aforesaid, according to the value thereof, duties. * * *"

And in the preceding paragraph of the statute a "succession" was defined to be—

> "A disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate or the income thereof upon the death of any person, * * *"

The subject matter of the tax, therefore, was not property, but the devolution of title to property—as much a legitimate subject of an excise as a transfer of title to real estate by deed *inter vivos*. Scholey *vs.* Rew is therefore a different case from the present.

(*b.*) The clauses of the Act of 1864, by which a tax was imposed upon personal estates of decedents passing in legacies or distributive shares, was never the subject of consideration by the Supreme Court.

We could admit that the tax imposed by these clauses in the Act of 1864 was also an excise, because the sum payable was measured by the amount of the legacy or distributive share received. As between persons in the same degree of consanguinity, the rate payable was a uniform rate per dollar of the amount received by such legatee or distributee. It could have been reasonably said, therefore, that the tax was not imposed upon the property of a decedent, but upon the act of taking a legacy or distributive share.

No such construction can be given to the Act of 1898. The tax is not measured by the amount of the legacy received, but by the total net amount of the decedent's estate. The illustration on page 12 of this brief shows that in the distribution of an estate as between children, it is not the amount received by each child which determines the tax, but the total amount passing to all distributees. It is clear, therefore, that the subject matter upon which the tax operates is the net amount of a decedent's estate.

The introduction of the graduated scale found in section 29 of the Act of 1898 not only gives ground for contesting the constitutionality of the tax for lack of uniformity, which we will discuss further on in the brief, but essentially changes the character of the tax. Under the Act of 1864 the tax was severable as against each legatee or distributee, and measured strictly by the amount of each legacy or distributive share. Under the Act of 1898 the amount of each legacy or distributive share is immaterial, the tax is scaled by the total amount of the estate.

For these reasons we submit Scholey *vs.* Rew is not a guiding authority in the present case.

In the case of Springer *vs.* United States, 102 U. S., 586, already quoted, the question determined was that a tax imposed upon income generally was an excise, and not a direct tax on property, and it is in that case that the definition of Mr. Hamilton is quoted with approbation as a guide to the judgment of the court.

The remaining case in which the court has been called upon to consider the provisions is the comparatively recent

case of Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., 429; 758 U. S., 601. We have already intimated that the difficulties which surrounded the determination of the question involved in that case do not arise here.

If the distinction between direct taxes and indirect taxes clearly stated in the question put to counsel by Mr. Justice Brown during the argument, 157 U. S., 491:—

> "Is not the distinction somewhat like thus: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?"

is applied to the present case, all difficulties are removed.

So in the opinion of Chief Justice Fuller, 157 U. S., 558, the following definition of direct tax is given as *prima facie* correct:—

> "Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

Again, in the same opinion, at page 582:—

> "Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general Government of the power of directly taxing persons and property within any State through a majority made up from the other States. It is true that the effect of requiring direct taxes to be apportioned among the States in proportion to their population, is necessarily that the amount of taxes on the individual taxpayer in a State having the taxable subject matter to a larger extent in proportion to its population than another State has, would be less than in such other State, but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.
>
> "It is not doubted that property owners ought to contribute in just measure to the expenses of the Government. As to the States and their municipalities, this is reached largely through the imposition of direct taxes. As to the Federal Government,

it is attained in part through excises and indirect taxes upon luxuries and consumption generally, to which direct taxation may be added to the extent the rule of apportionment allows. And through one mode or the other, the entire wealth of the country, real and personal, may be made, as it should be, to contribute to the common defense and general welfare.

"But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be fritted away, one of the great landmarks defining the boundary between the Nation and the States of which it is composed would have disappeared, and with it one of the bulwarks of private rights and private property."

So in the opinion of Mr. Justice Field, 157 U. S., 588:—

"Direct taxes, in a general and larger sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement."

So also in the opinion of Mr. Chief Justice Fuller, after the rehearing of the case last cited, 158 U. S., 621:—

"The founders anticipated that the expenditures of the States, their counties, cities, and towns would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal Government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the General Government should not be exercised, except on necessity; and when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminately, as to particular States or otherwise, by a mere majority vote possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. * * *

"Cooley (on Taxation, page 3) says that the word 'duty' ordinarily 'means an indirect tax imposed on the importation, exportation, or consumption of goods,' having 'a broader meaning than custom, which is a duty imposed on imports or exports;' that 'that the term imports also signifies any tax, tribute, or duty, but it is seldom applied to any but the indirect taxes. An excise duty is an inland impost levied upon articles of

manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities.'

"In the Constitution, the words 'duties, imposts, and excises' are put in antithesis to direct taxes."

In this opinion, also, recognition is given to Mr. Hamilton's definition, and the accuracy of the definition is vindicated at large in the following language (pages 624, 625):—

"Where did Mr. Hamilton stand? At that time he was Secretary of the Treasury, and it may therefore be assumed, without proof, that he favored the legislation. But upon what ground? He must, of course, have come to the conclusion that it was not a direct tax. Did he agree with Fisher Ames, his personal and political friend, that the tax was an excise? The evidence is overwhelming that he did.

"In the thirtieth number of the *Federalist*, after depicting the helpless and hopeless condition of the country growing out of the inability of the confederation to obtain from the States the moneys assigned to its expenses, he says: 'The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their admission by a distinction between what they call internal and external taxation. The former they would reserve to the State Government; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the Federal head.' In the thirty-sixth number, while still adopting the division of his opponents, he says: 'The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the direct and those of the indirect kind. * * * As to the latter, by which must be understood duties and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended.' Thus we find Mr. Hamilton, while writing to induce the adoption of the Constitution, first, dividing the power of taxation into external and internal, putting into the former the power of imposing duties on imported articles, and into the latter all remaining powers; and, second, dividing the latter into direct and indirect, putting into the latter duties and excises on articles of consumption.

"It seems to us to inevitably follow that in Mr. Hamilton's judgment at that time, all internal taxes, except duties and excises on articles of consumption, fell into the category of direct taxes.

"Did he, in supporting the carriage tax bill, change his

views in this respect? His argument in the Hylton case in support of the law enables us to answer this question. It was not reported by Dallas, but was published in 1851 by his son in the edition of all Hamilton's writings except the *Federalist*. After saying that we shall seek in vain for any legal meaning of the respective terms 'direct and indirect taxes,' and after forcibly stating the impossibility of collecting the tax if it is to be considered as a direct tax, he says, doubtingly: 'The following are presumed to be the only direct taxes: capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals or on their whole real or personal estate; all else must of necessity be considered as indirect taxes.' 'Duties, imposts, and excises appear to be contradistinguished from taxes.' 'If the meaning of the word excise is to be sought in the British statute, it will be found to include the duty on carriages, which is there considered as an excise.' 'Where so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived.' 7 Hamilton's Works, 848. Mr. Hamilton therefore clearly supported the law which Mr. Madison opposed, for the same reason that his friend Fisher Ames did, because it was an excise, and as such was specifically comprehended by the Constitution. Any loose expressions in definition of the word 'direct,' so far as conflicting with his well-considered views in the *Federalist*, must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject."

The recent opinion of the court in Nicol *vs.* Ames, 173 U. S., 509, in which the provisions of this Act of Congress providing for a stamp tax upon certain commercial transactions were sustained as an excise, and not a direct tax, are in entire harmony with the views which have been expressed in this brief.

Mr. Justice Peckham, at page 515, says:—

"This necessary authority is given to Congress by the Constitution. It has power from that instrument to lay and collect taxes, duties, imposts, and excises, in order to pay the debts and provide for the common defense and general welfare, and the only constitutional restraint upon the power is that all duties, imposts, and excises shall be uniform throughout the United States, and that no capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration directed to be taken, and no tax or duty can be laid on articles exported from any State. (Constitution, article I., section 8 and

section 9, subdivisions 4 and 5.) As thus guarded, the whole power of taxation rests with Congress.

"The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. * * *

"Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

"In searching for proper subjects of taxation to raise moneys for the support of the Government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties to the same kind of transaction. * * *

"We will now examine the several objections that have been offered to this statute.

"It may be stated, of course, that if the tax herein is a direct tax within the meaning of the Constitution, it is void, for there is no apportionment as required by that instrument.

"It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. Various cases are cited, from Brown *vs.* Maryland, 12 Wheat., 419, down to those involving the validity of the income tax, 157 U. S., 429; 158 U. S., 601, for the purpose of proving the correctness of this proposition. All the cases involved the question whether the taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property, or on the sale thereof, then these cases do not apply.

"We think the tax is, in effect, a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the Act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein,

nor is it a tax upon sales generally. The Act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and cannot on that ground be found to be direct. The tax laid in the same Act upon a broker's note or memorandum of sale is a separate tax, although it may have reference to the same transaction. It is a tax on the note or memorandum itself where made by a broker, while in the other case the tax, although measured in amount by reference to the value of the thing sold, is in reality upon the privilege or facility used in the transaction or sale. The tax is not a direct tax within the meaning of the Constitution, but is, as already stated, in the nature of a duty or an excise. The amount of such a tax when imposed in a case like this may be increased or diminished by the extent to which the privilege or facility is used, and it is measured in this Act by the value of the property transferred by means of using such privilege or facility, but this does not make the tax a direct one. A tax on professional receipts was recognized by the present chief justice in delivering the opinion of the court on the first hearing of the Income Tax case, 157 U. S., 429, 579, as an excise or duty, and therefore indirect, while on the income of personalty he thought might be regarded as direct. And upon the rehearing, 158 U. S., 601, it was distinctly held that the tax on personal property or on the income thereof was a direct tax. This tax is neither a tax on the personal property sold nor upon the income thereof, although its amount is measured by the value of the property that is sold at the exchange or board of trade."

While the judgment of the court in the case just cited was that the stamp tax in transactions in the mercantile exchanges was an indirect tax or excise, and therefore not necessarily a precedent for the determination of the present case, the opinion is most valuable as a clear statement of the line of demarcation between direct and indirect taxes, and its reasoning justifies counsel in urging the argument hereinbefore presented.

Upon this branch of the argument we therefore respectfully submit, in conclusion, that the tax in question is a di-

rect tax on property, and as such must be apportioned among the several States in proportion to the population shown by the last census. The statute in which Congress attempted to impose the tax contains no recognition of the constitutional requirement of apportionment, and hence was not a valid exercise of the Federal taxing power.

FOURTH.

Assuming, however, that the tax imposed by the Internal Revenue Act of 1898 is not a direct tax, but comes within the class of duties, imposts, or excises, then does it conform to the rule of uniformity prescribed by the Federal Constitution, article I., section 8, clause 1:—

"ALL DUTIES, IMPOSTS, AND EXCISES SHALL BE UNIFORM THROUGHOUT THE UNITED STATES"?

FIFTH.

It has been suggested that full effect is given to this constitutional provision if there be no direct discrimination as between the several States in the Federal statute imposing or levying duties, imports, and excises.

We respectfully urge that any such limited interpretation of this clause of the Constitution loses sight of the fact that this constitutional provision was declaratory of a fundamental principle of taxation which has found expression in the several Constitutions of nearly every State of the Union.

ALABAMA.—"All taxes levied on property in this State shall be assessed in exact proportion to the value of such property."

ARKANSAS.—"All property shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State."

CALIFORNIA.—"All laws of a general nature shall have a uniform operation. * * * All property in the State not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law."

COLORADO.—"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

FLORIDA.—"The legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property."

GEORGIA.—"All taxation shall be uniform upon the same class of subjects and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax."

IDAHO.—"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

ILLINOIS.—"The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, * * * in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates. * * * All municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

INDIANA.—"The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real

and personal, excepting * * * as may be especially exempted by law."

KANSAS.—"The legislature shall provide for a uniform and equal rate of assessment and taxation."

KENTUCKY.—"Taxes * * * shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax."

LOUISIANA.—"Taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, and all property shall be taxed in proportion to its value, to be ascertained as described by law. * * * In order to arrive at this equality and uniformity the General Assembly shall provide a system of equality and uniformity in assessments, based upon the relative value of property in the different portions of the State."

MAINE.—"All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof."

MARYLAND.—(Bill of Rights.) "Every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the Government, according to his actual worth in real or personal property."

MICHIGAN.—"The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

MINNESOTA.—"All taxes to be raised in the State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State."

MISSISSIPPI.—"Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. * * * Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

MISSOURI.—"Taxes * * * shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws. All property subject to taxation shall be taxed in proportion to its value."

MONTANA.—"The legislative assembly shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property except that specially provided for."

NEBRASKA.—"The legislature shall provide such revenues as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct * * * by general law, uniform as to the class upon which it operates."

NEVADA.—"The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessary, excepting," &c.

NEW HAMPSHIRE.—The legislature is given power "to impose and levy proportional and reasonable assessments, rates, and taxes upon all inhabitants of, and residents within, the said State, and upon the estates within the same."

NEW JERSEY.—"Property shall be assessed for taxes under general laws and by uniform rules, according to its true value."

NORTH CAROLINA.—"Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property according to its true value in money."

NORTH DAKOTA.—"Laws shall be passed taxing by uniform rule all property according to its true value in money."

OHIO.—"Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property according to its true value in money."

OREGON.—"The legislative assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property."

PENNSYLVANIA.—"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

RHODE ISLAND.—(Bill of Rights.) "The burdens of the State ought to be fairly distributed among its citizens."

SOUTH CAROLINA.—"The general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessary, excepting," &c.

SOUTH DAKOTA.—"All taxes to be raised in this State shall be uniform on all real and personal property, according to its value in money."

TENNESSEE.—"All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State."

TEXAS.—"Taxation shall be equal and uniform. All property in this State * * * shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. * * * All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax."

VERMONT.—(Bill of Rights.) "Every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion towards the expense of that protection."

VIRGINIA.—"Taxation * * * shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law."

WASHINGTON.—"All property in the State, not exempt * * * shall be taxed in proportion to its value, to be ascertained as provided by law. * * * The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property."

WEST VIRGINIA.—"Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value."

WISCONSIN.—"The rule of taxation shall be uniform."

It has never been suggested that these constitutional provisions in the several States would be complied with, either in letter or in spirit, by tax legislation whose only claim to uniformity was that it did not discriminate between the several counties or townships of the State. The universality of this rule of uniformity in the several State Constitutions is conclusive that the express enactment is but declaratory of an underlying fundamental principle of taxation. The framers of the Federal Constitution announced it because they recognized the rule as fundamental and to emphasize it not only as a rule to be applied with reference to each district or State, but as a principle which was to be of force throughout the Union.

In this connection it may not be amiss to refer to the very clear statement found in the argument of Mr. Edmunds in the case of Pollock *vs.* Farmers' Loan and Trust Company, 157 U. S., 494. One common thought runs through all these enactments, both in Federal and State Constitutions. Taxation upon the same subject matter shall be uniform. Uniformity of tax upon the same subject matter was the primary thought. In view of the divergent and conflicting interests which might arise between the citizens of different States, the framers of the Federal Constitution added the further protection that this uniformity should extend throughout the United States, otherwise, upon the doctrine of classification which has been invoked, an excise might be charged against a taxable article in the State of Massachusetts but in no other State, and the claim be made that as the tax was uniform in operation upon all within the class taxed, to wit, all such articles within the State of Massachusetts, hence that the constitutional requirements of uniformity had not been violated.

In order, therefore, that taxes may be uniform in the sense prescribed by the Federal Constitution, the tax must be levied uniformly upon the same subject matter, and the uniformity must extend throughout the United States.

The cases which have been cited to prove that the only uniformity prescribed is geographical uniformity:—

Loughborough *vs.* Blake, 5 Wheaton, 317;
Head Money Case, 112 U. S., 580,

when examined, do not sustain that view.

Loughborough *vs.* Blake is a decision that the power of Congress to levy and collect taxes, duties, imposts, and excises is coextensive with the territory of the United States, including the District of Columbia, and that hence Congress had power to impose a direct tax on the District of Columbia in proportion to the census directed to be taken by the Constitution. There is absolutely nothing in the case or in the opinion of Mr. Chief Justice Marshall to justify the citation of this case as an authority for the proposition that the only uniformity prescribed by the Constitution is geographical uniformity, or, in other words, that the only possible violation of the constitutional rule of uniformity would be found in geographical discrimination.

In the Head Money case, the tax imposed by the Act of Congress upon the owners of steam or sailing vessels bringing passengers from a foreign port into the United States of fifty cents for every such passenger not a citizen of this country, was objected to upon the ground that it was a tax which did not operate uniformly throughout the United States, because there were many States into which it was impossible to bring steam or sailing vessels from foreign ports.

It was held that the mere fact that the subject matter of the tax did not exist in every State did not prevent it from being uniform within the meaning of the Constitution.

If this case is to be cited at all in the discussion of the present question it should be cited for the proposition that uniformity upon the subject matter is the essential requi-

site of constitutional uniformity, even though in some geographical districts the subject matter may not exist. The decision cannot possibly be distorted into supporting the proposition that so long as no geographical discrimination is made, uniformity as to subject matter is not requisite.

On the other hand, an examination of the opinions of the Supreme Court of the United States in which the constitutional requisite of "uniformity" has been referred to, shows that geographical "uniformity" is not all that is involved in the constitutional provisions.

In Veazie Bank *vs.* Fenno, 8 Wallace, 533, Mr. Chief Justice Chase, at page 546, after referring to the prior decisions of the court upon the subject of what taxes are included within the class of direct taxes, added:—

> "It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity."

In United States *vs.* Singer, 15 Wallace, 111, Mr. Justice Field, in sustaining the excise on whisky levied in the Internal Revenue Act of 1868, said at page 121:—

> "The law is not, in our judgment, subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be 'uniform throughout the United States.' The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

In Gilman *vs.* Sheboygan, 2 Black, 510, Mr. Justice Swayne, in passing on the constitutionality of a statute of Wisconsin, in view of the provision of the Constitution of that State requiring taxation to be uniform, quoted with approval the decisions of the Supreme Court of that State in which uniformity throughout the State was thus defined:—

> "Taxing is required to be by a uniform rule, that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must extend to all property subject to taxation, so that all property must be taxed alike, equally, which is taxing by a uniform rule."

So in Pine Grove *vs.* Talcott, 19 Wallace, 666, the court, in construing the Constitution of the State of Michigan, which reads as follows:—

> "The legislature shall provide a uniform rule of taxation, except as to property paying specific taxes,"

said:—

> "The eleventh clause of the same article declares that the legislature shall provide a uniform rule of taxation, except as to property paying specific taxes, and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being classified, and taxed as classified, by different rules. All kinds of property must be taxed uniformly or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies. If a State tax, it must be uniform all over the State; if a county or city tax, throughout such county or city."

That mere geographical uniformity was not intended is also shown in the lectures of Mr. Justice Miller on the Constitution, cited in the opinion of Mr. Justice Field, in Pollock *vs.* Farmers' Loan & Trust Company, 157 U. S., 594:—

> "Mr. Justice Miller, in his lectures on the Constitution (N. Y., 1891), pages 240, 241, said of taxes levied by Congress: 'The tax must be uniform on the particular article; and it is uniform, within the meaning of the constitutional requirement, if it is made to bear the same percentage over all the United

States. That is manifestly the meaning of this word as used in this clause. The framers of the Constitution could not have meant to say that the Government, in raising its revenues, should not be allowed to discriminate between the articles which it should tax.' In discussing generally the requirements of uniformity found in the State Constitutions, he said: 'The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word "uniform" which has been adopted, holding that the uniformity must refer to articles of the same class. That is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people, and at all times.' "

SIXTH.

In urging the rule of uniformity, we are not unmindful that without infringing the rule of uniformity the legislative taxing power may divide the various subjects of taxation into different classes and impose upon each class such tax as the legislature may think right, and the power of classification is not necessarily limited to things of different names. Things of the same name belonging to the same genus may so vary one from the other as to be of different species, and as a separate species possess such characteristics as to justify a different rate of tax from that imposed upon other articles of the same genus, but having different qualities. But while recognizing to the fullest degree the power of legislative classification, we assert that such classification must always rest upon a rational foundation. An essential difference must exist between articles placed in separate classes, and a mere variance in the number of units, where such unit is the basis of taxation, does not justify classification based simply upon a difference in the number of units found in a common ownership. In the present case the unit for taxation is $100. If that unit of $100 is found in class one in company with not more than one hundred others, as shown in the table printed at page 4 of this brief, such unit, with all its associates, is exempt from taxation. If found in class two, the same unit, having no essential difference except the accidental difference of being found in company with other units, aggregating a sum from $10,000 to $25,000—that is, when there are from

100 to 250 of such units in a common ownership—the tax is at seventy-five cents for each unit. In the third class the same unit, with the accidental and not essential difference that it is found in company with other units of the same class, aggregating from 250 to 1000, is taxed at a still higher rate, and so on through the six classes. There is no essential difference in each unit of $100, whether it stand by itself or be found in company with other sums of $100, which renders such accidental difference the basis of rational classification for purposes of taxation.

Upon this point we are enlightened by the opinion of Mr. Justice Bradley, in Bell's Gap R. R. Co. *vs.* Pennsylvania, 134 U. S., 232. At page 237, in stating the limitations upon the power of taxation, he says:—

> "It (the legislature) may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excises upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our Governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise."

That legislation may be declared invalid by the courts as an unreasonable and unwarrantable exercise of the legislative power of classification is shown in the opinion of Mr. Justice Harlan, in Pollock *vs.* Farmers' Loan & Trust Co., 158 U. S., at page 674:—

> "If it were true that this legislation, in its important aspects and in its essence, discriminated against the rich because of

> their wealth, the court, in vindication of the equality of all before the law, might well declare that the statute was not an exercise of the power of taxation, but was repugnant to those principles of natural right upon which our free institutions rest, and, therefore, was legislative spoliation, under the guise of taxation."

The rule of equality was clearly stated in the same opinion, at page 676:—

> "I may say, in answer to the appeals made to this court to vindicate the constitutional rights of citizens owning large properties and having large incomes, that the real friends of property are not those who would exempt the wealth of the country from bearing its fair share of the burdens of taxation, but rather those who seek to have every one, without reference to his locality, contribute from his substance, upon terms of equality with all others, to the support of the Government.

And again, at page 690:—

> "I am of opinion * * * that the Government of the Union, in order to pay its debts and provide for the common defense and the general welfare, and under its power to levy and collect taxes, duties, imposts, and excises, may reach, under the rule of uniformity, all property and property rights in whatever State they may be found."

That uniformity upon all of the same class is a binding rule of valid taxation, even irrespective of constitutional provision, is expressed in the opinion of Mr. Justice Brown, in the same case, at page 693, where he says:—

> "Irrespective, however, of the Constitution, a tax which is wanting in uniformity among members of the same class is or may be invalid."

The limits upon the power of classification have been very clearly stated in several cases which have arisen in the Supreme Court of Pennsylvania. In Wheeler *vs.* The City of Philadelphia, 77 Pa. St., 338, in which it was held that a classification of municipal corporations as to matters of municipal government in accordance with population was rational classification, and hence was not special legislation violating the constitutional requirements of uniformity:—

"For the purpose of taxation, real estate may be classified. Thus timber lands, arable lands, mineral lands, urban and rural, may be divided into distinct classes, and subjected to different rates. In like manner other subjects, trades, occupations, and professions may be classified. And not only things, but persons may be divided. The *genus homo* is a subject within the meaning of the Constitution. Will it be contended that as to this there can be no classification? No laws affecting the personal and property rights of minors, as distinguished from adults, or of males distinguished from females, or in the case of the latter, no distinction between a *femme covert* and a single woman? What becomes of all our legislation in regard to the rights of married women if there can be no classification, and where is the power to provide for any future safeguards for their separate estate? These illustrations might be multiplied indefinitely were it necessary."

This opinion illustrates that which has already been pointed out, that even among things having the same name, to wit, cities, there may be such differences as to make a city of one population a different entity or subject matter from a city of a different population, and as between persons belonging to the *genus homo,* a man may be properly classified as a distinct entity from a woman, and even as between women, that the class of *femmes covert* may be treated as a distinct entity and a separate class for legislation as distinguished from the class of single women. In the later cases the same court, with great clearness, has pointed out that classification must be based upon some rational ground with reference to the legislation enacted, and that accidental and collateral differences were not sufficient to justify mere arbitrary classification. The legislature for governmental purposes may classify cities in accordance with population, but it is upon the ground that larger cities need different governmental organization from smaller cities, as was said in Ruan Street, 132 Pa. St., 257:—

"Among the many subjects of legislation which classification presents, we may call attention to such as the establishment, maintenance, and control of an adequate police force for the public protection; the preservation of the public health; protection against fire; the provisions of an adequate water supply;

the paving, grading, curbing, and lighting of the public streets; the regulation of markets and market houses, of docks and wharves; the erection and care of public buildings, and other municipal improvements. These are mentioned, not because they include all the subjects for the exercise of municipal powers, but as a suggestion of some of the more obvious ones, and as an illustration of the character of the subjects upon which legislation for the classified cities may be necessary. These classes are thus seen to embrace not mere geographical subdivisions of the territory of the State, but organized municipalities, which are divided with reference to their own peculiar characteristics and needs; and the legislation to which they are entitled by virtue of such division is simply that which relates to the peculiarities and needs which induce the division. In this way each class may be provided with legislation appropriate to it, without imposing the same provisions on other classes to which they would be unsuitable and burdensome."

"We come now to inquire what legislation remains forbidden to cities, notwithstanding classification. I reply that legislation not relating to the exercise of corporate powers or to corporate officers and their powers and duties is unauthorized by classification."

Hence, a classification of cities upon the numerical population could not be taken as a basis for the classification of other subject matters of legislation depending upon the accident of location within a particular class of municipalties. In the case last cited it was held that it was not within the power of the legislature to affect the civil rights of a citizen by varying those rights because of the accident of his living within a municipality of a particular class.

"But a statute is not above the Constitution. The Classification Act is subject to the limits which article III., section 7, prescribe, and it cannot transcend a single one of them. For that reason the courts of law in Philadelphia have the same jurisdiction and powers, and proceed in the same manner, as the courts in the other counties of the Commonwealth. The system of practice, so far as it rests on statutory provisions, must be the same. The same proceedings are had on writs, the same method for securing the benefit of the exemption of property from levy and sale, the same writ of *habeas corpus* for one who is restrained of his liberty, the same proceeding for one whose land is entered upon and appropriated to public or to corporate uses. These are the civil rights of the citizens of Pennsylvania as such, and they are not affected by the size of

> the town in which he lives or the value of his land, any more than by the color of his skin. They are the safeguards provided by the Constitution for the protection of the weak as well as the strong, the dweller in the country as well as the resident in 'cities of the first class,' and no system of classification of cities of other divisions of the State can disturb them."

And this line of reasoning led the same court to hold, in Weinman *vs.* Passenger Railroad, 118 Pa. St., 192, there being a constitutional prohibition against special legislation affecting corporations, that it was not competent to classify street passenger railroads into various classes depending upon their location within cities of the first, second, or third classes, pointing out that the situation of a railroad company within a particular municipality was a mere accident, having no relationship to the governmental function of the municipality as such.

An illustration of the rule against irrational classification is found in Commonwealth *vs.* Patton, 88 Pa. St., 258, where a certain Act of Assembly was by its terms applicable to all counties within the State of more than sixty thousand inhabitants, and in which there shall be any city incorporated at the time of the passage of the Act with a population exceeding eight thousand inhabitants, situate at a distance from the county seat of more than twenty-seven miles, by the usual traveled public road.

The court said:—

> "This is classification run mad. Why not say all counties named Crawford, with a population exceeding sixty thousand, and containing a city called Titusville, with a population of eight thousand, and situated twenty-seven miles from the county seat? Or all counties with a population of over sixty thousand, water by a certain river, or bounded by a certain mountain."

It is hardly necessary to cite authorities to support propositions which so recently have had the unanimous approval of this court.

In the case of Colorado Gulf & S. F. R. R. Co. *vs.* Ellis, 165 U. S., 150, the question was whether a statute of the State of Texas was constitutional, taxing a fifty dollar coun-

sel fee against railroad corporations unsuccessfully defending claims against them for cattle injured in the operation of their road. The statute was held invalid, the attempted classification being without reason in legal contemplation. The opinion of Mr. Justice Brewer contains an exhaustive review of authorities from many States, and also a clear definition of the limits of classification. He says:—

> "Yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.
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> "* * * The difference which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.
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> "* * * No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo. *vs.* Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation of

such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the foundation of free government."

The recent case of Nicol *vs.* Ames, 173 U. S., 509, is also valuable in its clear definition of the principles to be applied in construing the constitutional requirements of uniformity. The court held that sales in commercial exchanges were sales in a class which might be segregated from all other sales and be made the subject of a tax applying to such sales and not to other sales. The distinguishing features of such sales having been pointed out, Mr. Justice Peckham proceeds (page 521):—

"This general objection on the ground of want of uniformity is not, in our judgment, well founded. Whether the word 'uniform' is to be understood in what has been termed its 'geographical' sense, or as meaning uniformity as to all the taxpayers similarly situated with regard to the subject matter of the tax, we think this tax is valid within either meaning of the term. In our judgment, a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation. * * * The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. Gulf, Colorado, &c., Railway *vs.* Ellis, 165 U. S., 150-155; Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 283, 294. If the classification be proper and legal, then there is the requisite uniformity in that respect.

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places

> are untaxed. A sale at an exchange differs from a sale made at a man's private office, or on his farm, or by a partnership, because, although the subject matter of the sale may be the same in each case, there are at an exchange certain advantages in the way of finding a market, obtaining a price, the saving of time, and in the security of payment, and other matters, which are more easily obtained there than at an office or upon a farm. To accomplish a sale at one's farm or house or office might and probably would occupy a great deal of time in finding a customer, bringing him to the spot, and agreeing on a price. All this can be done at an exchange in the very shortest time and at the least inconvenience. The market is there, and all that is necessary is to send the commodity. Although a sale is the result in each case and the thing sold may be of the same kind, the difference exists in the means and facilities for accomplishing such sale, and those means and facilities there is no reason for saying may not be taxed, unless all sales are taxed, whether the facilities be used or not.
>
> "In this case there is that uniformity which the Constitution requires. The tax or duty is uniform throughout the United States, and it is uniform, or, in other words, equal, upon all who avail themselves of the privileges or facilities offered at the exchanges, and it is not necessary in order to be uniform that the tax should be levied upon all who make sales of the same kind of things, whether at an exchange or elsewhere."

The language of the court fully justifies the action of Congress in selecting sales at commercial exchanges as an integral class for taxation and the imposition of a tax proportionate to the sales. If, however, the Act of Congress had imposed a tax upon all sales at commercial exchanges, and measured the tax, not upon a scale simply proportionate to the sale, but in an ascending scale to be increased as the capital in business of the seller or dealer increases, taxing sales by dealers whose capital exceeds $100,000 three times the rate of sales by dealers whose capital was between $10,000 and $25,000, then we would have a question of uniformity in taxation analogous to the question now before the court in the succession tax. This court never has decided that such taxation is uniform within the meaning of the Constitution, and we respectfully ask that it will not now so decide.

From this review we feel justified in asserting that the

constitutional provision, when properly understood, imports that Federal taxation shall be uniform throughout the United States upon the same subject matter, and classification must rest upon a rational foundation, and cannot be made a cover under which to evade the rule of uniformity.

The principles of law upon which we rely are not open to dispute. The critical question before the court is the classification of estates for taxation by a graduated scale increasing the proportionate rate of tax as the amount of the subject of taxation passes from one class into a higher class, based upon such a rational distinction as to be a valid exercise of the legislative power.

We have already pointed out that the unit of taxation fixed by the statute is the sum of $100, and that the increased rate running through the six classes does not depend on any difference in the unit taxed, but upon the accident of these units being associated in a common ownership with other units to a specified aggregate amount. No justification for this attempt at classification has ever been presented based upon any reason which is connected with the subject taxed. The justification which has been asserted is entirely outside of the subject taxed. It is claimed that one receiving by inheritance or will a legacy of larger amount can bear the burden of taxation at a higher rate with less inconvenience than one who received a small legacy, but we have already pointed out that this attempted justification does not meet the case presented by the statute.

The tax is not imposed upon the amount of the legacy received. An only child inheriting an entire estate of $20,000 is charged with a tax at the rate of seventy-five cents on the hundred dollars, while a child receiving a legacy of $20,000 from a parent who divided $200,000 among ten children would have to pay at the rate of one dollar and fifty cents per hundred dollars. The statute does not purport to tax the receiving of the legacy, but taxes the estate for distribution in the hands of the executor. The comparative ability of the legatee to pay

cannot therefore be urged as a justification for the distinction in rate.

But passing this line of argument, which is in the nature of a criticism of the provisions of this particular statute, we stand upon the broader ground that it is a violation of the fundamental principle of uniformity to classify property for taxation upon the theory that large property interests or persons of larger means can make their contribution to the public treasury with less inconvenience, and therefore should be called upon to contribute at a higher rate per dollar than persons possessed of less means. If such grading for taxation be not in violation of the constitutional requirement of uniformity, then it is competent for the taxing power to grade farms, dwelling houses, and all forms of property into six classes, or as many more as the taxing power may deem expedient, and exempt from taxation all farms and dwelling houses not exceeding $10,000 in value, and by a graduated scale impose the entire burden of maintaining the Government upon such property, the value of which exceed $10,000, in a common ownership. The illustration just given expresses a more common instance of taxation than an excise on inheritances or legacies. But we have already shown that this excise or duty, if it is to be sustained, is to be sustained solely as an exercise of the taxing power, and not of the legislative power, to regulate the disposition of estates by will or the distribution of the property of intestates. If the Federal taxing power can tax legacies by a graded tax, the State taxing power, although limited by like constitutional requirements of uniformity in taxation, may grade for taxation farms and dwelling houses and every other taxable commodity.

Such grading for taxation introduces distinctions for taxation which have heretofore been absent from the American theory of government. By statutory enactment the community would be divided into six classes, with degrees of wealth as the distinguishing feature.

By far the most numerous class—in number many times exceeding the aggregate of all the other classes—to wit,

those not possessed of personal property exceeding $10,000—would be relieved from all responsibility of contributing towards the expenses of the State—the small minority divided into five classes with increasing rates as they ascend in the scale of wealth.

Those opposing graduated taxation have sometimes expressed the fear that the system would be destructive to accumulated wealth; that a majority of the populace would control legislation so as to effect through excessive legislation a redistribution of the estates of the rich, and thereby relieve the body of the people of any share in the burden of supporting the Government.

We are not moved by any such fear. History justifies the belief that in all such conflicts the rich have proved well able to protect their own interests, but we do urge the court to declare that such graduated taxation is destructive of the fundamental principles of equality before the law, which knows no man as rich or poor, but all as equal.

We ask this court to announce in unmistakable language that the doctrine of equality before the law is to be preserved, not through any fear of the effect of the statute upon the estates of the rich, but because the permanence of republican institutions depends upon the obliteration before the law of all classification dependent merely upon considerations of wealth.

The nation has grown to its present wealth and prosperity through the energy and independent character of its free people. Every boy, even though his only inheritance was integrity of character and a good name, knew that before the law he was the equal of the most favored son of fortune—an equality, not only of opportunity, but an equality of duty and responsibility.

If the great body of the American people should be relieved of the duty of doing their share in supporting the State according to their means upon some mistaken theory of taxation that the rich can better afford to be heavily taxed than the poor to be taxed at all, the qualities which have heretofore been the distinguishing marks of American

freemen will no longer characterize our people. The great body will be a proletariat, relieved of the responsibility of supporting the State, and consequently lost to that sense of responsibility towards the State, without which government by the people cannot be maintained.

No more fatal blow could be given to popular government than the incorporation into the body of our legislation of this principle of graduated taxation. We do not charge that the author or the defenders of this legislation have any conscious purpose of undermining our free institutions, but with all the seriousness which the gravity of the subject demands, we assert that the general establishment of any such system of taxation would be to place the control of the Government in the hands of the "taxed" class. If the body of American voters come to feel that they have no duty to support the State, they will exercise the right of suffrage in *forma pauperis*, and be the willing vassals and adherents of the rich and successful, who will have new and cogent reasons for maintaining control of public affairs.

No more certain way of establishing an American plutocracy as the successor of the American democracy could be suggested than by legislation and judicial judgment to recognize a division of the community into the six classes according to the scale of wealth prescribed in the statute. Unless all the lessons of history are read in vain, the classes distinguished by the burden of supporting the public treasury would soon become the masters of the masses thus declared unworthy of the honors of citizenship. The duty of supporting the State is as honorable a privilege as the right of suffrage. He who through weakness or incapacity accepts the benefit of a legal declaration that he owes the State no duty of support withdraws himself from the class worthy to exercise the privileges of American citizenship. Those willing to be enumerated in such a class would be worthy the place of serfs. The five statutory classes charged with the duty of supporting the State could fairly claim to be an American aristocracy, for by Act of Congress they alone have been declared worthy of supporting the Republic.

The views which we have here endeavored to express have been formulated by Mr. Justice Field, 157 U. S., 586:—

> "Under wise and constitutional legislation every citizen should contribute his proportion, however small the sum, to the support of the Government, and it is no kindness to urge any of our citizens to escape from that obligation. If he contributes the smallest mite of his earnings to that purpose he will have a greater regard for the Government and more self-respect for himself, feeling that though he is poor in fact, he is not a pauper of his Government. And it is to be hoped that, whatever woes and embarrassments may betide our people, they may never lose their manliness and self-respect. Those qualities preserved, they will ultimately triumph over all reverses of fortune."

We do not ask the court to usurp the function of the legislature in determining the mere question of the policy of the statute. The objection is not to the policy of the statute, but fundamental, as in contravention of the elementary principles of American life.

SEVENTH.

An examination of the decisions of the several State courts in which the question of progressive inheritance tax has been considered shows that these cases may be divided into two classes:—

(*a.*) Those in which the court held that the duty imposed upon the succession was a tax. In these cases the constitutional requirement of uniformity was held to be binding, and statutes passed in disregard of the provision were held unconstitutional. Such have been the decisions of the Supreme Courts of Pennsylvania, Ohio, New Hampshire, Missouri, and Minnesota.

(*b.*) Those cases in which it was held that the amount which by statute became payable into the State Treasury was not a tax in the ordinary sense of taxation, but was the exercise by the legislature of its reserved power of control over the devolution of estates either upon intestacy or by will. In such cases, where the legislation was not regarded as an exercise of the taxing power, but as an exercise of

the legislative control over the devolution of the estate, the statute has been sustained. Such are the decisions in the courts of Illinois, Maine, Colorado, Montana, and Massachusetts.

It may therefore be instructive to mark this distinction.

The latest and one of the most satisfactory discussions of the subject is found in the opinion of Mr. Chief Justice Sterrett, of the Supreme Court of Pennsylvania, in Cope's Appeal, 191 Pa. St., 1. In the course of the opinion the following is found:—

> "As to the character of the Act, there cannot be any doubt. That it is an Act imposing taxes on the personal property therein specified is too plain for discussion. To hold otherwise would be a perversion of the plain meaning of the words employed in entitling the Act and specifying its provisions. As we have seen, its title declares it to be 'An Act taxing gifts, legacies,' &c., and providing for the collection thereof. Section 16 declares that it shall be 'known as the Direct Inheritance Tax Law.' The 'personal property' specified in the Act is, in express words, 'made subject to the tax,' &c. (section 1). The second *proviso* to that section expressly declares 'that so much of the estates of persons heretofore deceased as has not been actually distributed and paid to persons entitled thereto prior to the passage of this Act shall be liable to the tax imposed by this law, as well as the estate of persons who die hereafter.' Section 5 declares: 'All taxes imposed by this Act shall be a lien upon the personal property of the estate on which the tax is imposed, or upon the proceeds arising from the sale of such property,' &c. It is also an Act exempting 'from the payment of this tax, in all estates,' personal property specified therein to the amount of $5000.
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> "The Act in question has none of the features of an intestate law, or of an Act regulating the disposition of property by will or by instruments in the nature thereof. On the contrary, upon its face and in all its provisions it is manifestly a tax law, clearly and distinctly predicated of the actual existence and general operation of an intestate law and a will's Act, under the operation of one or other of which the personal property intended by its provisions to be subjected to taxation would pass from the then, as well as subsequent, owners thereof to others, or had theretofore passed and become vested in others prior to the date of the Act under consideration. * * *
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> "It is of the very essence of taxation that it should be relatively equal and uniform, and where the burden is common

there should be a common contribution to discharge it: Cooley's Constitutional Limitations, *495. In his Treatise on Taxation (2d edition), pages 2, 3, the same learned author says: 'In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform ratio of equality. The power is not, therefore, arbitrary, but rests on fixed principles of justice which have for their object the protection of the taxpayer against exceptional and invidious exactions, and is to have effect through established rules operating impartially.'

"Equality in the imposition of the burden is of the very essence of the right, and though absolute equality and absolute justice may not be attainable, the adoption of some rule tending to that end is indispensable. Equality as far as practicable and security of property against irresponsible power are principles which underlie the power of taxation as declared ends and principles of fundamental laws.' Desty on Taxation, 29, and cases there cited. * * *

"The language of section 1, as to what the rule of uniformity shall embrace, is as broad and comprehensive as it could possibly have been made. The words, 'all taxes,' must necessarily be construed to include property tax, inheritance tax, succession tax, and all other kinds of tax the subjects of which are susceptible of just and proper classification. By necessary implication, the first clause of that section recognizes the authority of the legislature to justly and fairly, but never arbitrarily, classify those subjects of taxation with the view of effecting relative equality of burdens. A pretended classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary, and illegal. For example, a division of personal property into three classes with the view of imposing a different tax rate on each, class 1 consisting of personal property exceeding in value the sum of $100,000; class 2 consisting of personal property exceeding in value $20,000 and not exceeding $100,000; and class 3 consisting of personal property not exceeding in value $20,000, would be so manifestly arbitrary and illegal that no one would attempt to justify it. * * *

"These propositions are predicated of the assumed principle that the right to inherit or succeed to property is not a natural but merely a civil right (1 Sharswood's Blackstone, 398 and 399), and hence the Commonwealth, acting through its law-making power, may assert its sovereign right to take and appropriate to its own use such portion or portions of the estates, real, personal, and mixed, of every decedent as the legislature,

in its wisdom, may consider necessary and proper. They also assume that the people of this State, in their fundamental law, have placed no restriction on legislative power in that regard.

"Without pausing to consider the soundness as well as the scope of the principle thus broadly asserted, but conceding, for argument's sake merely, that the legislature has the power under our Constitution to so change the law of descent and succession as to give the Commonwealth a certain portion of every decedent's estate, or to otherwise regulate the transmission or devolution of such estates, it does not by any means follow that the 'direct inheritance tax law' under consideration is such an Act. As we have seen, the Act does not profess to be a supplement to or an amendment of our laws relating to the estates of testates, but quite the reverse. There is nothing in its title or its text to indicate anything else than that it was intended to be a tax law imposing a tax of two per centum on the personal property of decedents therein specified within the scope of article IX. of the Constitution; but assuming, for argument's sake only, that it is otherwise—that it was in fact intended to be an Act supplementary or amendatory of existing laws regulating the succession to estate of decedents, we think it clearly offends against the clause of article III., section 7 of the Constitution, which declares: 'The General Assembly shall not pass any local or special law * * * changing the law of descent or succession."

So in State *vs.* Switzler, 143 Mo., 287, the Missouri graduated inheritance tax of 1895 was held void upon the ground of the progressive feature of that Act, whereby estates under $10,000 were taxed at one rate and estates over $10,000 were taxed at an increased rate. Mr. Chief Justice Gantt delivered an opinion, in which was said:—

"No doubt longer exists that it is competent for the legislature to levy a tax upon the succession of estates. It is equally universally held that such a tax is not a tax upon property in the ordinary sense, but is in the nature of an excise or bonus enacted by the State upon the privilege or right to inherit or succeed to an estate. * * *

"The controlling question is upon what did it authorize that tax to be levied, upon the property or estate of the deceased person, or upon the right or privilege of his beneficiaries to receive his estate by inheritance or devise? If upon the latter it is settled by the great weight of authority that it does not fall within the regular ordinary taxation upon property which our Constitution requires shall be in proportion to its value. * * *

"A succession tax is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another, under the regulation of the State.

"Section 1*a* of the Act requires the tax to be levied upon the appraised value of the whole estate left by the deceased. The tax is at once levied upon that estate, and the personal representatives of the deceased, not the devisees and legatees, are required to pay the tax. We think the language of this Act imposes a tax directly upon the property of the decedent, and not upon those who may succeed to his estate, and it must be conceded that if it is a property tax it is unconstitutional, because it subjects it to additional property tax to that levied upon all other like property in the State for the same year, and it is not levied in proportion to its value.

"But in no event can the Act of 1895 be upheld, because the tax authorized by it is not 'uniform upon the same class of subject within the territorial limitations of the authority levying the tax.' Section 3, article IX., Constitution of Missouri.

"It is significant that in New York, Maine, Maryland, Virginia, Pennsylvania, and Massachusetts, in which inheritance taxes are sustained, the statutes only authorize a uniform rate of taxation.

"The constitutional guarantee of uniformity upon the same class of subjects would avail but little if the legislature can arbitrarily vary the classes as often as the amount of property devised or transmitted by inheritance shall differ. * * * Where the amount of property received is made the basis of the tax, uniformity can only be attained by levying the same per cent. upon the property of each beneficiary under the will or by inheritance. * * * When the legislature makes the amount of money received by each the test of classification, it runs counter to another principle, that is well nigh universally accepted, that the uniform rate of taxation upon every man's property secures equality of burden. To levy a different rate simply because the amount of each man's holdings is different would produce favoritism and destroy the principle of equality before the law, which is the boast of every government. If it be urged that the one receiving the larger estate enjoys a greater privilege, still the principle of uniformity answers that the value of his right to receive is in direct proportion to the value of the property to which he succeeds, and must, if taxation is to be uniform, be taxed in the proportion, or according to one common rate."

So in State *vs.* Ferris, 53 Ohio State Reports, 314, the Act of April 20th, 1894, entitled "An Act to impose a direct

inheritance tax," whereby a progressive tax was imposed upon the estates exceeding $20,000 in amount, was held unconstitutional. The opinion of the court contains the following:—

"Our Constitution requires equality in our tax laws, and also equality in their execution as near as may be. The only exemption allowed, as to taxation of property, is personal property to the amount of $200 to each individual, and certain other property devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the legislature has the power to exempt personal property from taxation. The Constitution must be regarded as consistent with itself throughout, and as section 2 of article XII. permits an exemption from taxation of personal property not exceeding $200, a construction of section 2 of the Bill of Rights is thereby evinced to the effect that in taxation on subjects other than property, an exemption up to $200 in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent. must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the Constitution, and it is this equality that is to provide a safeguard of us all. It was this principle, more than any other, that induced the decision of Kocking Coal Co. *vs.* Rosser, 52 O. S., 12.

"In support of the law it is urged that this exemption and graduation must be sustained upon the ground that the cost of administration in a small estate are proportionately larger than in a larger one, and that therefore the small estate should be free from this taxation. The answer is that equality in taxation is required by the Constitution, and that our administration laws are enacted upon the principle of equal protection and benefit of the people, and this unequal mode of taxation is not required to remedy any defect in the burdens of these laws.

"Again, it is urged in support of the law that an estate not exceeding $20,000 is in the nature of a necessity for the support of widow and children: that the widow and children succeeding to so moderate a property ought to be exempted from paying the State anything for the privilege. The answer to this, as well as to the former proposition, is that we are not here considering the policy or equity of this exemption, but the power of the legislature to make such discrimination when prohibited from so doing by the second section of the Bill of Rights.

When this power is once conceded, the manner of exercising the same is limited only by the will of the legislature. In determining constitutional questions, courts should not attempt to solve them by reasoning only along the lines of the principles of equity. But the reasoning should be along the lines of the Constitution, for it may be that the very object of the Constitution is to abandon and cut loose from what has heretofore been regarded as equity in particular cases, or upon a particular subject matter. The question is, therefore, not what would be equitable, but what is constitutional. Equity cannot be permitted to override the Constitution.

"Again, it is urged in favor of the statute that the State has the right to say that the heir or legatee or the devisee of a large property enjoys a disproportionate privilege because what he received is in the nature of a luxury, and luxuries ought to be subject to higher taxes. The answer to this is that the value of the right to receive is in direct proportion to the value of the property received, and must under the Constitution be taxed according if taxed at all. As to the higher tax by on luxuries, it may be said that such a rule might find a place in tariff legislation, where all are free to indulge in the luxuries or not as they see fit, but that such a rule can find no support in taxation under a Constitution requiring equality in taxation and laws to be for the equal protection and benefit of all.

"Again, it is claimed in favor of the law that this statute is not purely for the raising of revenue, but for the regulation of the succession and transfer of property, and that the State has the right of saying that it will regulate the matter of succession to great estates by making a greater charge for the privilege, and thus discourage the holding together of great estates until death.

"The answer is that the matter of succession and transfer of property is already fully regulated by our statutes as to wills, descent, distribution, and conveyances, and if further regulation is desired purely as regulation aside from revenue, it would most likely be sought in the amendment of these statutes.

"The Act is clearly one for taxation and not for regulation, as is shown by its provisions and title. The State finds no warrant in its Constitution for saying that it will make a greater rate or charge for the privilege of succeeding to large estates than to smaller ones, but on the contrary, it is expressly prohibited by the requirement that laws shall be for the equal protection and benefit of the people."

So in State *vs.* Gorman, 40 Minn,. 232, the Act of 1885 imposed a tax graduated upon a progressive schedule, and

exempted estates of $2000 and less. The Act was held unconstitutional. The court said:—

> "It is apparent that these exactions are taxes, and if the constitutional rule of approximate equality has been disregarded, the law cannot stand. It seems hardly necessary to refer particularly to the schedule of values and of amounts required to be paid to show that the law wholly fails in apportioning the burden imposed, to regard the constitutional rule of equality measured with reference to the value of the property taxed. * * * While a large discretion must be allowed to the legislature in devising schemes for taxation so as to secure equality as nearly as may be, it can hardly be doubted that in this case the constitutional requirement was not observed, very likely for the reason that it was not considered that these exactions were taxes within the meaning of the Constitution. We feel certain that they must be so regarded.
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> "The same reasons for the conclusion that these exactions constitute an unconstitutional mode of taxation, lead also to the conclusion that the law is opposed to section 8, article I., of the Constitution."

And the same rule was enforced in Curry *vs.* Spencer, 61 N. H., 624, where the court said:—

> "An answer to the inquiry is readily afforded; for while by article V. of our Constitution the legislature is empowered to assess and levy taxes, this grant of power is expressly limited to 'proportional and reasonable assessments, rates, and taxes upon all the inhabitants and residents within the said State, and upon the estates within the same,' and by the Bill of Rights (article XII.) every inhabitant is bound to contribute only his share, which manifestly, and according to the uniform decisions of this court for more than half a century, cannot be more than his proportional share of the common burden.
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> "Immunity from disproportional taxation being expresssly reserved in our Bill of Rights, and the power of proportional taxation only being granted the legislature by the Constitution, we are unaware of any ground upon which the statute under consideration can be upheld; for if it is to be regarded as a tax on property, it is open to the objection of unequal and double taxation, and if it is to be regarded as a tax on a civil right or privilege, it is discriminating and disproportional.
>
> "We therefore go no further than to say that if the legislature deems it expedient to defray the expense of Probate Courts by a tax upon the recipients of estates therein adjudicated, such taxes must be proportional, and constitute only the just share

of those upon whom it is imposed; that it cannot lawfully make discriminations and cast the burden upon one class of beneficiaries and exempt all other classes from its operation; and that it cannot, therefore, for the purposes of taxation, exempt legacies and successions to husband, wife, children, and grandchildren, and include only those of the collaterals and others than those specified.

"Chapter 64 must be declared void and inoperative, and the plaintiff is advised accordingly."

On the other hand are the cases in which such exactions from the funds of estates have been sustained as not an exercise of the taxing power as such, but an exercise of the State's power to regulate the devolutions of estates of decedents. In the leading case of Kochersperger *vs.* Drake, 167 Ill., 122, the following is found:—

"The existence of the common law within the State of Illinois results from the provisions of chapter 28 of the Revised Statutes, which declare that the common law of England and the statutes of a general nature made prior to the fourth year of James I. shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority. By that authority chapter 39 of the Revised Statutes, entitled 'An Act in regard to the descent of property,' and chapter 148, entitled 'An Act in regard to wills,' were enacted, which in effect repealed the common law in reference to inheritance, and also repealed the statute enacted prior to the fourth year of James I. in reference to devises. There is not in force in this State under chapter 28 any law providing for the descent or devise of property. The laws of descent and the right to devise and take under a will within the State of Illinois owe their existence to the statute law of the State. The right to inherit and the right to devise being dependent on legislative Acts, there is nothing in the Constitution of this State which prohibits a change of the law with reference to those subjects at the discretion of the law-making power. The laws of descent and devise being the creation of the statute law, the power which creates may regulate, and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death, and the ownership of which the State then provides for by law of descent or devise. The imposition of such a condition or burden is not a tax upon the property itself, but on the right of succession thereto. To deny the right of the State to regulate the administration of a decedent's estate. * * * No want of

uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise except by the statute, and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown. Laws of this character have been sustained in Pennsylvania, New York, Maryland, Virginia, North Carolina, and other States. They have been held invalid in New Hampshire and Ohio and some other States. We are not disposed to enter into an analysis of these cases and a consideration of the principles on which they have been decided. The broad principle presented is that the legislature may create new classes of property with reference to estates, under which they may regulate the right to inherit or devise and take under devises; and such right existing, such classes may be created, and as created may be uniform; and the assessment by valuation when declared to operate equally on the right to succession to such classes, is not a violation of the provisions of the sections of article IX. of the Constitution of the State of Illinois."

So *in re* House Bill No. 122, Supreme Court of Colorado, the court was requested by legislature to render its opinion as to whether a proposed statute was in conflict with the provisions of the State Constitution. The opinion rendered was as follows:—

"*Per curiam.* The bill attached to the interrogatory provides for the levy and collection of what is commonly designated as an inheritance tax. The right to impose such tax is based upon the power of the State in its sovereign capacity to regulate and control the transmission of property by inheritance. Although designated as a tax, it is not such a tax upon property as is contemplated by section 3 of article X. of the State Constitution. It is rather a contribution which the State levies, for it is a condition upon which the title to property shall pass upon the death of the owner; hence the interrogatory propounded must be answered in the negative."

In Minot *vs.* Winthrop, 167 Pass., 113, such a tax was sustained upon the ground stated, as follows:—

"Statute of 1891, chapter 425, entitled, 'An Act imposing a tax on collateral legacies and successions,' is constitutional, as the privilege of transmitting and receiving by will or descent property on the death of the owner is a 'commodity' within the meaning of this word in the Constitution of Massachusetts,

chapter 1, section 1, article IV., and an excise may be allowed upon it; and the objections that a tax is unequal because not imposed upon all estates and upon all heirs, devisees, legatees, and distributees, and is unreasonable on account of the exemptions in the first section, 'that no estates shall be subject to the provisions of this Act unless the value of the same, after the payment of all debts, shall exceed the sum of $10,000,' are not well founded."

But Lathrop, J., dissented, saying:—

"So far as I am aware, no excise tax heretofore passed in this Commonwealth has contained an exemption. Assuming that reasonable exemptions may be allowed, it seems to me that the legislature in the statute now before us has so far exceeded its powers that the exemptions should be construed as so unreasonable, as to work so great an inequality, that the Act should be pronounced unconstitutional.

"There is also another objection to which I see no answer. If this tax is to be considered unconstitutional, on the ground that it is a tax upon the privilege of taking by devise or succession, there is clearly on the face of the Act no equality. Suppose A. and B. die seized of separate estates, the respective values of which, after payment of debts, are $10,000 and over $10,000. A. bequeaths a legacy to C. of $5000 and B. bequeaths a legacy to D. of the same amount; C. and D. each enjoys the same privilege, yet C. pays no tax while D. pays a tax of $250. Can this be said to be equal, or even reasonable? The necessary effect of the tax is to produce inequality, and in my judgment it is as much the duty of the court to declare the statute to be in violation of the Constitution as if it imposed a tax upon property and were disproportionate."

It is to be noted in this case that there was no question of a progressive graduated tax, but simply the question of an exemption.

And in State *vs.* Hamlin, 86 Me., 495, there was no progressive tax, but simply an exemption of $500.

In Gelsthrope *vs.* Furnell (Montana), 51 Pac. Rep., 267, the court said, as a ground for sustaining a statute containing this exemption:—

"The reasoning of the many cases upholding such laws proceeds upon the indisputable proposition that the State has the power, unless denied it by constitutional prohibitions, to regulate the devolution and distribution of an intestate's property and equal authority to limit the power of a testator to bequeath his property to whom he pleases."

This citation of cases justifies the assertion that there s no authority for the proposition that in a taxing statute the rate of tax imposed may be increased in a graduated scale according to the value of the property taxed. The State decisions, which might seem to support such a proposition, when examined, only go to the extent of holding that a sovereign State, having control over the estates of decedents, may by statute designate the public treasury as the distributee of such portion of an estate as the legislature may think proper, but such legislation is not properly speaking an exercise of the taxing power.

CONCLUSIONS.

1. The only Federal power which can be invoked to sustain the provisions of the Act of June 13th, 1898, which are here questioned, is the taxing power. Congress has no power to legislate with reference to the devolution of the estates of decedents or to regulate or control the exercise of the testamentary power of citizens in the several States.

2. This legislation cannot be sustained as a direct tax. It is in effect a tax upon the entire net personal estate of each decedent, and as such comes within Mr. Hamilton's definition of a direct tax.

3. If the tax be held to be an indirect tax, it fails to comply with the constitutional requirement of uniformity.

The court is therefore asked to hold the provisions of the statute invalid as in violation of the Federal Constitution.

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